No. 41505-4

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF:

DANIEL RAYMOND LONGAN,

PETITIONER.

SUPPLEMENTAL REPLY

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A. INTRODUCTION

The State raises a series of objections in its supplemental brief. The State argues: (1) the hallway was open to the public; (2) Longan consented to closure by not personally requesting to be present; (3) the portion of trial conducted in the hallway was ministerial; (4) the error was not "structural;" (5) Longan should be prevented from relitigating this issue; and (6) this Court should remand for a hearing to determine whether the hallway was open to the public.

Longan addresses the State's arguments in order, although he combines the State's first and last arguments (which are one in the same).

B. ARGUMENT

1. Has the State Properly Disputed Closure?

Although the State indicated it contested Longan's facts in its original response, the State did not present any competent evidence to show that the hallway was closed until its supplemental brief. The Washington Supreme Court has held: "The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence." *In re PRP of Rice,* 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Longan contends that the State's proof comes too late. The supplemental briefs requested by the Court did not ask for new evidence. Recently decided caselaw did not make facts, previously irrelevant, relevant. Because the State's response did not identify disputed facts and meet Longan's evidence with its own, the State failed to meet its burden.

If this Court concludes that it can consider new evidence attached to the surresponse, then an evidentiary hearing is needed to resolve the dispute about whether the hallway was public or private at the time of Longan's trial. *Rice, supra.*

2. Did Longan Consent to Closure by Waiving His Presence?

The State argues that Longan waived his right to a public trial when he arguably waived his right to be present. Caselaw is completely contrary to the State's argument. *In re PRP of Morris,* 176 Wash.2d 157, 288 P.3d 1140 (2012) (waiver of the right to be present, however, should not be conflated with waiver of the right to a public trial).

3. Inquiring About a Potential Juror's Ability to Serve is Not "Ministerial."

Both the Washington Supreme Court and this Court have both held that voir dire questions regarding the ability to serve are part of trial. See *State v. Irby,* 170 Wash.2d 874, 246 P.3d 796 (2011); *State v. Slert,* 169 Wash.App. 766, 774, 282 P.3d 101 (2012).

Black's Law Dictionary 1011 (7th ed.1999) defines "ministerial" as "[o]f or relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill." An act is ministerial if the individual is performing a duty that is mandatory for the person to perform and there is no discretion in how that act is performed. *Burg v. City of Seattle,* 32 Wash.App. 286, 290–91, 647 P.2d 517 (1982). The duty must be defined so precisely as to leave nothing to the exercise of discretion or judgment. *City of Bothell v. Gutschmidt,* 78 Wash.App. 654, 662–63, 898 P.2d 864 (1995). Questioning and excusing a juror for cause do not fit this definition.

The questioning here is no different than the in chambers conference that took place in *State v. Slert,* 169 Wash.App. 766, 282 P.3d 101 (2012). This Court's holding in *Slert* was reinforced by the Washington Supreme Court's recent decisions discussed in Longan's supplemental brief.

The questioning of a potential juror about that person's ability and fitness to serve and the judge's decision to keep or dismiss that potential juror is included, not exempt from the public trial right.

4. The Error is Structural and Requires Reversal

Switching focus from subject matter to duration, the State next argues that some violations of the right to a public trial are just too quick in time to merit reversal. Although all of the Washington caselaw is contrary to the State's position, Tthe State persists in arguing that reviewing courts

should measure the harmfulness of a public trial violation with a stop-watch. Caselaw demands otherwise. See *e.g., State v. Tinh Trinh Lam*, 161 Wash.App. 299, 254 P.3d 891 (2011) (and cases cited therein) (questioning of one juror in closed court requires reversal).

5. The Relitigation Bar Does Not Apply

Despite the fact that Longan supplied this Court with a material fact that it did not have on direct review (that the hallway was private), the State nevertheless argues that this Court is precluded from reviewing the closed courtroom claim. However, caselaw holds that the ends of justice merit re-examination of an issue where it is supported by some new evidence, which is exactly what Longan has done. *In re Personal Restraint of Benn,* 134 Wash.2d 868, 886, 884 85, 952 P.2d 116 (1998).

C. CONCLUSION

Based on the above, this Court should either: (1) reverse and remand for a new trial; or (2) for an evidentiary hearing.

DATED this 28th day of February, 2013.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on February 28, 2013, I served a copy of this supplemental reply brief on opposing counsel by sending it attached to an email directed to the Cowlitz County Prosecutor's Office and DPA Michelle L. Shaffer.

February 28, 2012//Portland, OR
Date and Place

/s/Jeffrey E. Ellis
Jeffrey Ellis